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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In the manner of Napoleon's army on its return from Moscow, since *certiorari* was granted respondent Johnson Controls has abandoned much of its argumentative weaponry. Most particularly, except for a single footnote, respondent has jettisoned its claim—and the Court of Appeals' holding—that the fetal protection policy at issue here is a policy whose legality is to be judged under Title VII's "disparate impact-business necessity" theory.[1] Instead, respondent is now willing to "proceed[] on the assumption" (Brief for Respondent at 17 n.24) that the exclusionary employer policy in this case, which adversely affects women alone, involves classic facial sex discrimination and, under the plain terms of Title VII, is lawful only if justified under the bona fide occupational qualification ("bfoq") defense set out in § 703(e), 42 U.S.C. § 2000e-2(e), with the burden as to all elements of that defense on the employer. *Compare* Brief for Petitioners (Pet. Br.) at 12-26.

Thus, this case now centers on delineating the elements of the bfoq defense as applied to a situation in which an employer excludes *all* fertile women from a broad range of jobs because of concerns involving the

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[1] In one footnote, respondent does profess to "agree with every court of appeals considering the issue that fetal protective measures can be analyzed under a business necessity inquiry", and to agree as well with the Chamber of Commerce that the Pregnancy Discrimination Act (PDA) requires that "a plaintiff must first demonstrate that she has been treated differently from others whose employment in the job at issue would create a similar risk to unborn children." Brief for Respondent (Resp. Br.) at 17, n.24.

The first contention is refuted in our opening Brief (at pp. 12-25), and, as well, in the Brief of the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioners (U.S. Br.) (at pp. 10-16), and needs no further response. As to the second contention, the short answer is that the PDA does *not* specify that women affected by pregnancy and related conditions must be treated the same as others who "would create a similar risk to unborn children," but the same as those "similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

health of any children those women *might* conceive while employed.

In this regard Johnson Controls' position is that the elements of the bfoq defense are the *same* as those recognized by the Court of Appeals in this case under the "business necessity" rubric, with the only difference being that the burden of proof as to all these elements is upon the defendant employer, *not* the plaintiff employees. According to respondent, if the employer shows a workplace condition that creates a substantial risk of harm to employees' offspring;[2] transmission of that harm to offspring through one sex only;[3] and the lack of a less dis-

[2] Respondent states this element as applying only to "toxic hazards." Resp. Br. at 16. There are, however, many other asserted risks to fetal health in modern day workplaces, including, *inter alia*, radiation, stress, infection, air pollution, heat, cigarette smoke and noise. Indeed, since the filing of our opening Brief, examples of reports providing some evidence of such particularized fetal risks have continued to appear. *See, e.g.*, Miller et al., *Pregnancies Among Physicians: A Historical Cohort Study*, 34 Journal of Reproductive Medicine 790 (1990) (women practicing physicians had four times the premature births of other women, perhaps because of stress or long hours standing). *See also* Pet. Br. at 43-44; Pet. App. 100a. (Easterbrook, J., dissenting) ("Risk to the next generation is incident to all activity, starting with getting out of bed."). There is in short no basis in Title VII or in reason for carving out a special fetal protection rule for *toxic* hazards.

[3] On this question, *none* of respondent's experts pointed to any animal *or* human studies *showing* that there is *no* such male mediated effect; they simply relied on the *absence* of any definitive proof through human studies of such an effect. *See* Resp. Br. at 6.

Petitioners' experts, in contrast, pointed to a wide range of both human and animal evidence, explaining while "we probably never will have [definitive human studies] because of the very nature of the problem" (J.A. 256, 258 (Legator)), human studies indicate male mediated fetal loss, fertility problems, abnormal sperm, and chromosomal abnormalities at levels both above and under the general OSHA lead limit, all of which are strongly indicative of genetic defects at low levels of exposure (J.A. 207, 215, 216-17 (Silverstein); 252, 255, 259 (Legator); (J.A. 236-238 (Silbergeld), and animal studies likely to be pertinent to human physiology, showing fertility effects, abnormal sperm, and learning deficits in offspring at exposure levels in all likelihood functionally comparable to the blood lead levels at which respondent allows men to work (J.A. 207, 210, 211 (Silverstein); 237 (Silbergeld); 251-52 (Legator)).

Summarizing this evidence, Dr. Marvin Legator, Director of Environmental Toxicology at the University of Texas Medical Branch and former Chief of the Genetic Toxicity Branch of the Food and Drug Administration, stated that "putting the whole thing together, humans, animals . . . one would have to conclude that lead is . . . [the] one [chemical] that has been studied to a great extent . . . that probably causes a genetic lesion during spermatogenesis" (J.A. 256), which in turn indicates "transmissible genetic damage . . . later manifested by abnormalities such as behavioral abnormalities" (J.A. 255) at levels below the current OSHA standard (J.A. 256-259).

Respondent maintains that in the face of this evidence and expert opinion, the Court of Appeals was correct in holding that the employer had proven definitively that there was *no* male mediated effect. But in its business necessity analysis the Court of Appeals only considered the question of whether "the *UAW* . . . has present[ed] present facts sufficient to carry [the] burden of demonstrating *the absence* of . . . the risk of transmitting lead exposure to unborn children only through females," putting great emphasis, as this quotation indicates, upon its *erroneous* placement of the burden of persuasion. Pet. App. 35a, 28a-32a (emphasis supplied). The conclusion below that the UAW had not done so can *not* be transmutted into a holding that respondent had carried its burden of proof.

Indeed, we submit that judgment cannot be awarded in respondent's favor on this question since the employer did *not* present any affirmative evidence that males do *not* risk fetal health injuries due to lead exposure while the petitioners did present substantial evidence of such a risk.

[4] By concentrating on the central legal question in this case, we do not mean to suggest that we accept respondent's version of the facts, or of how the law is to be applied to those facts.

This case was decided on summary judgment in favor of the defendant employer. What that procedural circumstance means, of course, is that where there is a substantial conflict in the record sufficient to permit a finding against the party bearing the burden of proof on a particular factual issue—in this instance, primarily on questions of scientific fact as testified to by competing experts—

criminatory protective alternative, the employer has justified a policy excluding that sex from its workplace. Resp. Br. at 16.[4] This statement of the governing law is trebly flawed.

1. *The BFOQ's "Comparison of Fetal Risks to Adult Risks" Requirement.* Respondent's Brief proceeds on the unstated, unexamined assumption that Title VII permits an employer to single out fetal risks as the *only* risks to human health against which the employer will provide perfect, zero-risk protection. That assumption can not withstand reasoned scrutiny.

According to this approach, it would be permissible for an employer in the interest of protecting fetuses from health risks to exclude all fertile women from its manufacturing workforce—regardless of their age, marital status, sexual activity, or other factors affecting the likelihood that they will conceive a child—while continuing to expose the employees the employer does hire to risks of comparable severity and probability.[5]

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neither one version nor the other can be taken as established. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (same). While the propriety of granting summary judgment, *assuming a proper legal standard*, is not before this Court, because not an independently certworthy question (Petitioner's Reply Brief on Petition for Writ of Certiorari (Reply Br.), at 6-7 n.4), our contention in this case is that for a myriad of reasons, the proper legal standard was *not* applied. In evaluating that contention, and in applying the *proper* legal standard to this case, the Court must take the summary judgment record as it is, and not, as respondent apparently believes, as if that record consisted only of the testimony on disputed facts that favors the defendant employer's position, or as if the courts below made fact findings binding on this Court, even where those courts ignored the plaintiff employees' evidence or made statements without any support in the record.

[6] It is important, because respondent's arguments obscure the point, to be clear that risk assessment involves both a qualitative factor *and* a quantitative factor.

In the first regard, there has never been a dispute in this case about the fact that the *kind* of harm caused to fetuses and young children by lead exposure is significant.

The quantitative issue is, however, much more uncertain. Perhaps most to the point, because the employer here excludes all fertile women, and not only pregnant women, *quantitative* risk assessment must include some calculation of the likelihood that individual women employees will become pregnant during a time when

The obvious net effect of this suggestion would be to *permit employers to exclude all fertile women from almost all nonsedentary jobs* and many other positions as well. That is foreordained because the same safety and health dangers that affect adults in such jobs obviously endanger as well, to at least the same degree, any possible fetus that a fertile woman employee *might* conceive.[6]

Moreover, employers in general, and Johnson Controls in particular, clearly do *not* regard an overall *zero-risk* safety and health risk protection program as "reasonably necessary to the normal operation of [their] business" (§ 703(e)), as a whole, any more than individuals (including pregnant women) conduct their daily lives on an entirely risk-free basis.

To the contrary, despite pious incantation of "the overriding importance of industrial safety" (Resp. Br.

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the employee's lead blood levels are elevated. But, no such risk calculation has been made. Nor was there any attempt to quantify other than by vague generalizations (*see* Resp. Br. at 2 & n.2) how likely it is that a particular child born to a woman with a given blood lead level will in fact exhibit any learning deficit whatever. *See* Pet. App. 90a (Easterbrook, J., dissenting).

[6] The policy rationales put forward in this case on respondent's behalf also fail to distinguish between the situations in which there is *some* substantial risk to fetal health, and those in which there is a special risk *only* to the fetus (or a much higher risk to fetal health than to adult health).

For example, an employer's *legal* duty to fetuses, or to children not yet conceived (Resp. Br. at 27-29), exists with respect to *any* pregnant or potentially pregnant employee, and whether or not the fetus is *particularly* susceptible to a certain hazard. Similarly if, as the Court of Appeals suggested, an employer may single out fetal health for *greater* protection than employee health because "[t]he unborn child has no opportunity to avoid this grave danger," while the mother can make a " 'decision to weigh and accept the risks of employment' " for herself (Pet. App. 51a, *quoting Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977)), employers would have the latitude to overrule the mother's decision to drive a car as part of her employment while pregnant since "a female employee might somehow rationally discount [the] clear risk" (Pet. App. 51a) to fetal health should an accident occur.

at 30), it remains true that in general, the health and safety protection generally regarded as *proper* protection is not *perfect* protection: Automobiles can crash, people can fall, health care workers can become infected with diseases, and so on. Consequently, even where the risks to fetuses and to adults *do* differ somewhat in the type of danger posed or in the degree of danger at various exposure levels or circumstances, under a zero-risk fetal protection policy that excludes all fertile women, there is a major difference in the *degree of protection* provided against fetal risks and against adult risks overall (including reproductive risks that do not result in fetal effects).[7]

In the specific lead exposure context presented here, batteries can and do explode;[8] sudden changes in lead exposure can occur, due to employee carelessness or otherwise;[9] employees can fail to follow hygiene procedures and carry lead home on their clothes to expose their children;[10] adult employees in lead-exposed jobs can

[7] This is true, we emphasize, even where adults suffer *different* risks at the levels of exposure at which fetuses are in danger, or even where adults suffer *no* risks at those levels of exposure. For the issue is whether adults suffer risks from the same hazard that affects fetuses at the higher levels to which adults are *in fact* exposed in the plant, or whether adults suffer industrial risks of equivalent qualitative and quantitative magnitude due to *other* hazards in the plant. If so, then the level of risk protection accorded fetuses—perfect protection—is not "reasonably necessary" to the "normal operation" of the plant.

[8] *See Jones, et al. v. Sears and Roebuck, Inc., Globe Union Inc., et al.*, No. 585-427 (Cal. Super. Ct., San Diego County, May 17, 1987), *appeal filed* No. D009904 (Cal. Ct. App., 4th App. Dist., Div. 1, filed Apr. 10, 1990) ($9.7 damages award against Johnson Controls for injury due to an exploding battery.)

[9] *See* J.A. 153 (Beaudoin) ("in an average manufacturing facility . . . [lead exposure] conditions change so quickly, that you can have an overexposure which you may not detect until it shows up in the circulating blood two to eight weeks later"); J.A. 118 (blood lead levels measured only every six months if the last level was under 40 mg/dl.)

[10] J.A. 158 (Beaudoin); J.A. 174-75 (Chisholm).

suffer ill effects from lead, including strokes or heart attacks,[11] as well as reproductive damage through injury to sperm.[12] While the record does not permit the quantification of any of these risks, the facts adduced do suggest that each is substantial. Specifically, there was expert testimony to that effect (*e.g.*, J.A. 243, 246 (Silbergeld)),[13] and fifty-seven of respondent's employees filed lead-related worker compensation claims from 1976-1986 (R. 47, Ex. D, Dft's Response to Pltfs' Interrogatory No. 8), with several recovering substantial awards (*id.*).[14]

The reason Johnson Controls abides these risks to its employees, obviously, is that, *on balance*, respondent believes, rightly or wrongly, that given the need to produce goods and otherwise to conduct its affairs, *zero risk* health and safety is not necessary to its business, much less possible.

Title VII's major purpose is to compel employers to give equal employment opportunity concerns supervening value in making employment decisions; that is why the *only* defense to facial sex discrimination, the bfoq, is "the

[11] These effects, and attacks, can occur between company-mandated periodic medical examinations, if any. *See* J.A. 130, 136 (except where there are perceptible symptoms, medical examinations are conducted only for those incumbent employees with more than 40 mg/dl blood lead level or higher, and then only annually); Pet. Br. at 8 n.9. In addition, there are some ill effects which cannot be predicted readily through medical examinations, at least until the damage is done. J.A. 227, 262 (cancer, mood changes, impaired memory).

[12] Respondent conceded that there is evidence in the record confirming an elevated risk of reduction in male sterility at levels at which male employees are allowed to work. Pet. Br. at 6-7 (summarizing evidence of male reproductive effect). *Compare* J.A. 116-119, 134-137 (setting out biological and medical tests routinely conducted, without indicating any sperm tests).

[13] *See also* Pet. Br. at 6-8 (summarizing evidence on non-fetal occupational health effects of lead). *See also* Landrigan, *Lead in the Modern Workplace*, 80 American Journal of Public Health 907 (1990).

[14] Johnson Controls' extensive health monitoring system was in effect throughout that period. J.A. 92, 104, 127.

narrowest of exceptions to the general rule requiring equality of employment opportunities." *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977). *See generally* Pet. Br. at 42-45. At the very least, then, an employer attempting to establish a bfoq defense should be required to show that the employer gives as much weight in making risk-benefit calculations to Title VII values as to production and other business values. This equivalence is best tested by determining the quantitative and qualitative nature of the health and safety risks the employer otherwise "normally" abides in its "particular business," and comparing the degree of protection accorded fetuses on a gender-specific basis to that benchmark.

Indeed, Congress, in overruling *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), specifically intended to prevent employers from singling out any of the "whole range of matters concerning the childbearing process" (H.R. Rep. No. 95-948, 95th Cong., 2nd Sess. (1978)) for more detrimental treatment than that accorded other comparable workplace health-related matters. *See* 42 U.S.C. § 2000e(k); Pet. Br. at 32-33. In the present context, that principle *at a minimum* requires that just as employers may not, under the Pregnancy Disability Act (PDA), ignore the functional similarity between pregnancy-related disabilities and other disabilities for disability insurance purposes, so employers may *not* treat the female-specific risks to human health, that may occur because fetuses, enclosed in their mother's bodies, necessarily come to the workplace with their working mothers, as more important than other risks to human health.

In short, under Title VII, an employer may *not* invoke the bfoq defense to justify perfect fetal protection through exclusion of all fertile women when the employer does not otherwise run a zero-risk business.[15] On

[15] There is *nothing* in the Court of Appeals majority opinion that so much as pays notice to the question whether Johnson Controls protects the health of employees and other adults *to the same degree* that respondent protects fetal health. Rather, in both its bfoq analysis and business necessity analysis, the Court of Appeals

this basis alone, the judgment below must be reversed.[16]

focussed *only* on "Johnson's interest in protecting the health of the unborn through the female employee." Pet. App. 55a. This is true even though there was extensive evidence by the petitioners' experts on adult health effects *at the levels of exposure in question* (*see* Pet. Br. at 7-8), and even though a major part of the argument made in the briefs to the Court of Appeals was that the comparison issue is critical (*see* Reply Br. at 9-12; Pet. App. 50a-59a).

Further, the single footnote in Respondent's Brief (n.54, p. 41) devoted in any way to the question of comparative risks provides no *conceptual* basis for focussing on the fetal risk question in a case of this kind to the exclusion of all other risks, but makes only a single *factual* argument: Adult health risks created by lead, says respondent, can be individually monitored, and "corrective actions, including removal *when necessary*" can be taken. (Emphasis supplied). But while some adult risks can be monitored, and some are, the record certainly does not establish that *all* the adult risks (such as cancer, mood swings or subtle neurological impairment) can be monitored in time the prevent their effect, or that *all* the relevant risks (including impairment of sperm function) that can be monitored *are* monitored, or, most importantly, that adult health risks are *perfectly* protected by *prospective* removal of anyone who *might* develop an ill-effect. *See also* J.A. 233-35 (Silbergeld) (blood tests conducted by Johnson Controls would *not* necessarily provide a "clear cut answer" concerning male fertility problems, and those problems might or might not be reversible.) Indeed, the latter is clearly *not* the case, since, for example, annual medical examinations and blood testing bi-monthly or every six months will not preclude the possibility of elevated blood pressure, or sudden heart attack or stroke due to hypertension, between examinations or testing.

[16] On this record one cannot even begin to do a comparative risk analysis, since there is no way to quantify the actual risk of birth defects through maternal exposure. Such information as there is suggests that the risk is quantitatively very small, and therefore not likely to be substantially greater than the other risks to employee health respondent accepts without question.

Respondent represents the record as establishing that there were, under the 1977 policy that cautioned women about fetal risks but did not exclude them against their will from job opportunities, "a substantial number" of pregnancies of women with blood lead levels "well in excess of 30," and that "one of the infants born to this group showed early signs of lead poisoning." Resp. Br. at 9. The facts are these: From 1979 to 1982 there were six births to mothers with a greater than 30 mg blood lead levels during the month of conception; the median blood lead level of that group was

See Pet. App. 88a-95a (Easterbrook, J., dissenting) (surveying the impossibility of addressing the comparative risk issue on the present record.) [17]

2. *The BFOQ's "Reasonably Necessary" Requirement.* Johnson Controls maintains, too, that a facially discriminatory policy is "reasonably necessary" within the mean-

37 mg; in only one instance was the child recorded as having high blood lead levels, although the record does not say what was considered "high"; and there is *no* indication that any of those children had a birth defect. Beaudoin Aff. Ex. K (R. 37). (The evidence cited by the Court of Appeals (Pet. App. 7a-8a) that supposedly confirms an actual birth defect does not concern, as far as the record shows, a woman known to have an elevated blood level, nor does the testimony indicate that the child had high blood lead levels when born, rather than afterward. R. 38, Ex. A, Fishburn Depo. at 72-73.) It is, moreover, unclear how many women employees were in lead exposed jobs at Johnson Controls during the relevant periods, or how many of them became pregnant; the record shows only that there were 275 women employed as production employees two years *after* the mandatory exclusion policy for non-incumbent women went into effect. J.A. 70.

Given this imprecision, the most one can say on the present record (using the 275 figure although it is probably low, and the one elevated blood lead birth, although it is probably high) is that it appears that even with warnings "more likely to allay than to arise concern" (Pet. App. 70a (Posner, J., dissenting)), the probability that a child was actually born to a Johnson Controls employee with elevated blood lead levels over a several year period—let alone with any perceptible learning problem, as to which there is *no* direct evidence—was a very small fraction of one percent. In short, substantially more than 99 percent of the women excluded from jobs during that period did *not* pose any danger to any future children they conceived. (A calculation of this kind could come out very differently if the exclusion were of pregnant women only, although that estimate as well is impossible on the present record (since the total number of pregnancies is not known).)

[17] Further, as Judge Easterbrook also noted, any fair comparison of the risk protection for fetuses and the general level of health and safety risk protection afforded by an employer would include some way of factoring in the economic injury caused by a particular exclusionary fetal-protection policy, and of accounting for the liklihood of injury to fetuses due to that economic injury to the mother. Pet. App. 94a; *see also* Pet. App. 71a (Posner, J., dissenting); Pet. Br. at 39-40.

ing of Title VII's bfoq defense if there are no "adequate but less discriminatory alternatives" to the discriminatory policy; and that, of necessity, there are no such alternatives if it is "impossible or highly impractical" to ascertain a health risk on an individual basis. Resp. Br. at 37-38.[18]

The flaw in this contention is that in the fetal protection context the bfoq requires the employer to demon-

[18] Johnson Controls goes on to maintain that in the Court of Appeals petitioners waived their claims as to the legality of an exclusion of all fertile women by declining *under a disparate impact/business necessity standard* to bear the burden of proof on the question whether the employer could provide protection through alternatives with a lesser impact upon women. Resp. Br. at 12 n.20, 46-48.

This waiver argument rests on the false premise that this case is governed by a "business necessity" standard. Respondent, as we noted at the outset, continues to try to dragoon the rules developed in the disparate impact context (as to which there is no statutory language concerning the elements of proof, and as to which the burden of proof on all elements remains on the plaintiff (*Wards Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S. Ct. 2115, 2126 (1989)), into the bfoq defense. But the explicit statutory bfoq language does not refer to less restrictive alternatives as a separate factual element at all, but requires generally that *the defendant employer* prove that the particular *gender-specific* qualification the employer chose is "reasonably necessary" to its business.

Where the employer chooses to make its "reasonably necessary" proof by demonstrating a harm that only a few of the women excluded will actually suffer or cause, the employer may have proved that it is "reasonably necessary" to exclude those women, but the employer has not met the statutory requirement of demonstrating that *sex* is a bona fide qualification "reasonably necessary" to the essence of the business. Against that legal background, it is plain that petitioners certainly did not excuse respondent from meeting *its* burden of proof as to the most central element of its defense by declining to present affirmative evidence on a question which arises under an entirely different statutory theory.

Indeed, the Court of Appeals so recognized, since that court analyzed at length (albeit in our view incorrectly) whether respondent had proven the "reasonably necessity" of its gender-specific qualification for employment, and never suggested that the issue had been waived. Pet. App. 52a-59a.

strate that "all or substantially all" of the individuals who are denied employment opportunities present a substantial risk to real children—that is, children who are likely to be born—rather than hypothetically possible children. *See Grant v. General Motors Corp.*, —— F.2d —— (6th Cir. No. 89-3478, July 20, 1990); Pet. App. 60a n.1 (Judge Cudahy, dissenting). Thus, respondent's position does *not* provide a justification for a fetal protection policy that excludes *all* fertile women.

Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. 702, 708 (1978). While

> [f]or some jobs, . . . there may be relevant skills that cannot be identified by testing[,] [y]et Title VII clearly would not permit use of . . . sex . . . as a proxy for such an employment qualification, regardless of whether a statistical correlation could *Norris*, 463 U.S. 1073, 1085 n.15 (1983).]

be established. [*Arizona Governing Committee v.* Against this background, the basic understanding is that in the ordinary situation—including one in which some sort of occupational safety issue is involved—gender cannot be a bfoq unless "'all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'" *Dothard v. Rawlinson*, 433 U.S. at 333.

Johnson Controls counters that *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), is to the contrary (Resp. Br. at 40); respondent vastly overreads that opinion.

The *Criswell* Court affirmed a judgment that under the Age Discrimination in Employment Act, commercial flight engineers can be removed from their positions at the age of 60. In so doing the Court held that where "the essence" of the business in which individuals are employed is *safe mass transportation* (472 U.S. at 420-421), an employer can meet its "reasonably necessary" burden by showing *either* that "all or substantially all

[persons over the age qualifications] would be unable to perform . . . the duties of the job involved" or, alternatively, that "some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class," (*id.* at 414-15).

Criswell's second alternative is in obvious tension with the general principles emphatically stated in *Manhart* and *Norris*, summarized above. Since *Criswell* gives no indication of an intent to abandon or overrule these principles, it appears that this aspect of its holding is specific to a very narrow range of circumstances. And, indeed, this aspect of *Criswell* was developed in a case which stressed that "'the *lives of numerous persons* are completely dependent on the capabilities of the job applicant'" (*Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234 (5th Cir. 1976) (emphasis supplied), and has *only* been applied in instances in which there is a potential for a *mass public safety disaster* if the individual in question could not carry out his or her job duties properly for health reasons. *See* cases cited in *Criswell*, 472 U.S. at 415 n.23; *see also* Pet. Br. at 31; and *Criswell*, 472 U.S. at 415 (citing legislative history showing that Congress intended the individualized testing requirement to apply "'[f]or example, in certain types of *particularly arduous* law enforcement activity.'" (emphasis supplied)).

Thus, as far as we are aware, *Criswell*'s second test has never been deemed applicable to ordinary occupational safety issues. For example, although any use of tools or machinery involves safety considerations, *Criswell's* "individualized testing" rationale has not heretofore been thought to justify banning older employees from all such jobs. *See also Dothard v. Rawlinson, supra.* By the same token, we do not believe that *Criswell* permits employers to erect inflexible age barriers for the employment of salesmen because salesmen have to drive cars as part of their jobs, although a salesman could

certainly be discharged if the employer had an *individualized* basis to question his or her ability to drive safely.

Since it is thoroughly implausible that *Criswell's* "individualized testing" rationale is intended to apply *whenever* safety considerations are implicated by a Title VII case, the question becomes whether that rationale has any application to the present kind of case. We submit that, for two reasons, the answer is "no."

First, this is *not* a situation in which the main "risk" that, in the employer's view, justifies a broad ban on *all* fertile women—the possibility that any fertile women *could* (by definition) become pregnant—"cannot be ascertained by means other than knowledge of the applicant's membership in the class." *Criswell*, 472 U.S. at 414.15. To be sure, the *employer* cannot obtain that information with any accuracy without an unacceptable intrusion in to the personal lives of employees. *But* the woman herself (like the plaintiff Elsie Nason, who was 50 years old and divorced (Pet. Br. at 9)) may be well aware of facts that absolutely preclude her pregnancy, or may resolve, upon receiving full information from the employer regarding fetal risks, as required by the Occupational Safety and Health Act, either to take extraordinary steps to keep her blood lead level low (such as respirator use or special training) or to use reliable contraception as long as she works in a lead-exposed job.[19] In contrast, the main risk at issue in *Criswell* situations —*viz.*, those in which individual testing is insufficient— are subtle, internal health issues of which the employee herself is ordinarily unaware.

Second, in this situation, the *primary* responsibility to protect an employee's child from harm is that of the mother herself, and our society generally assumes that she will discharge that obligation better than third parties. Thus, in a case allowing parents to commit their minor children to a mental institution, this Court noted:

> [H]istorically, [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children . . . . That some parents "may at times be acting against the interests of their children . . . creates a basis for caution, but is hardly a basis to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interest. . . . Simply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents . . . [*Parham v. J.R.*, 442 U.S. 584, 602-603 (1979)].

In contrast, an employee in a *Criswell* situation has no preexisting obligation to the third parties being protected, nor is there a core societal judgment that in the vast majority of cases he or she will act with the best interests of the customers or the public in mind.

These two factors, taken together, deflate any contention that the inability of the *employer* to know who is planning to, or might, become pregnant suffices to create a situation covered by *Criswell's* "individualized testing" rationale.

3. *The BFOQ's "Occupational Qualification" Requirement.*

a. In our opening Brief, we stressed that because fetal protection policies do *not* involve *"occupational"* qualifications at all such policies do not come within Title VII's carefully drawn bfoq provision. Pet. Br. at 25-45. We relied on *Dothard v. Rawlinson*, 433 U.S. at 333-34, for the basic proposition that "the restrictive language of § 703(e)," *inter alia*, indicates that "the bfoq exception was in fact meant to be an extremely narrow exception," and added that dispensing with that limitation would greatly—and impermissibly—expand the exception.

At bottom, Johnson Controls response to our argument is that reading the bfoq as " 'a broad exception

[19] One of Johnson Controls' experts put the matter this way: "[T]o exclude . . . from work with lead . . . women of child bearing age . . . is clearly discriminatory if one considers the demographics of family size, age and parity, marital status and the widespread use of birth control in the U.S. . . . ." J.A. 194 (Whorton).

: . . [that] would largely emasculate the act' " (*Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971)) is perfectly acceptable. *See* Resp. Br. at 19 n.26.[20] It suffices, we believe, to point out that respondent —while making a brave show—is unable to point to *any* case in which a bfoq defense *has* been upheld where the asserted justification did not involve in any way the employers' interest delivering the business' product or service.[21]

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[20] We note that accepting this basic proposition does *not* lead inescapably to the conclusion that *any* mandatory policy protective of fetal health but applicable to already-pregnant women would also be invalid under Title VII. Where only the period of pregnancy is involved, solutions such as temporary transfers and paid leaves become economically plausible. Moreover, once a woman is actually pregnant, the comparison to other industrial health and safety situations becomes somewhat more colorable, since the existence of health concerns at that point pertain to an actual fetus, rather than to a hypothetically possible one. It may be, given those differences, that an employer could demonstrate, by comparison to policies the employer applies to other employees who temporarily present some sort of particularly heightened and immediate health risk, that a carefully devised policy applicable to pregnant women alone is not discriminatory, in that *similarly situated* individuals are treated the same regardless of gender.

[21] The privacy cases respondent cites (Resp. Br. at 25), for example, directly involve the employer's business interest in serving the customer, client, or patient.

In arguing for opening up the bfoq defense beyond performance-related criteria, respondent's sole reference to the statutory language is to the word "normal." Relying on Judge Posner's opinion below, respondent maintains that "normal" does not refer only to the way that the "particular" business *usually* operates, but to how the business *should* operate, applying "ethical, legal and business concerns" (Pet. App. 64a-66a) external to the business itself. With all deference the passage in question indicates that Judge Posner is better at economics than linguistics.

While, as Judge Posner noted (Pet. App. 64a), it is not "normal" today to produce batteries with slave labor, even a committed abolitionist would have said in 1860 that it *was* "normal," though wrong, to grow cotton in the South with slave labor. Similarly, in *Dothard v. Rawlinson, supra*, the Court recognized that the violence in that prison, although unconstitutional, was part of the "normal operation

b. Johnson Controls' efforts to find support for broadening Title VII's bfoq provision in the views of regulatory and advisory federal agencies (Resp. Br. at 21-24), are equally unavailing.

First and most importantly, this is a Title VII case. The ultimate *policy* question pertinent here that Congress addressed in enacting Title VII is whether *individual employers* should be allowed to override the decisions of individual employees regarding proper health precautions for any children those employees may choose to have.

That policy issue is quite different from the one that arises where an expert *government agency* makes a particularlized decision about child health under its power to protect the public health and welfare, in two regards: (i) The government is in a better position than an individual employer to collect and objectively analyze all the available scientific information. (ii) The government is also in a better position to consider the *entire* set of factors pertinent to the complicated balancing of risks at issue, including the consequences of female unemployment and underemployment for child health and welfare, and for the government's health, welfare and unemployment costs. *See* Pet. Br. at 36-42. That Congress decided *not* to allow individual employers fundamentally to compromise equal employment principles as a means of protecting fetal health in no way portends a later determination that the *government* cannot do so in particular exigent circumstances, under a statute permitting such a fetal protection policy.

In any event, respondent's assertions notwithstanding, the fact is that *no* governmental agency has determined that employers may broadly ban women on a gender-specific basis from employment to protect fetal health. The Occupational Safety and Health Administration (OSHA) certainly has not: In the sentence just before

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of that *particular* . . . enterprise." 42 U.S.C. § 2000e-2(e) (emphasis supplied). The dictionary definitions respondent cites (Resp. Br. at 18 n.25) are not to the contrary.

the one respondent quotes, OSHA, far from endorsing "gender-specific fetal protective measures" (Resp. Br. at 23 n.31), recognized that, on a gender-*neutral* basis, "temporary medical removal may in particular cases be needed for *workers* desiring to parent a child in the near future, or for particular pregnant employees," and confirmed in the next sentence that the category of "workers" includes both "[s]ome males" and "some women." 43 Fed. Reg. 52,974 (1978) (emphasis supplied).[22]

Nor has the Environmental Protection Agency (EPA) sanctioned the allocation of job opportunities according to gender-based criteria. EPA did decide in one instance, in a situation that was declared to be an "emergency", that a particular, unregistered pesticide could be used, in a few locations on a temporary basis, except by fertile women. However, EPA eventually banned that pesticide for all uses, and in any event was concerned only with proscribing the use of a certain chemical to perform a limited task, not with whether an employer could exclude all fertile women from his work force. 43 Fed. Reg. 47777 (1978); 44 Fed. Reg. 11112 (1979) (determinations of emergency); 47 Fed. Reg. 46885 (1982) (providing for expiration of all permission to use the pesticide as of June 30, 1983).

The Center for Disease Control (CDC) Report which respondent emphasizes is also entirely beside the point here. As Dr. John Rosen, the Chairman of the CDC Advisory Committee on Childhood Lead Poisoning, appearing as *amicus curiae* in this case in *opposition* to respondent's position, states:

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[22] Further, OSHA was contemplating only "temporary" removals, not permanent exclusion, and only for those employees with an expressed intention to bear a child, not for employees with no intention of doing so. 43 Fed. Reg. 52974 (1978). Indeed, OSHA's reference to the possibility of temporary removal for "an employee who is pregnant or who is planning to conceive a child" (29 C.F.R. § 1910.1025 App. C, p. 182; *see* Resp. Br. at 23 n.31), is *on its face* gender neutral, since men as well as women can "conceive a child."

> The CDC looked only at the devastating effects of lead on children and concluded that all exposures should be reduced. A study focussing on other subgroups in the population, such as males with high blood pressure or otherwise at risk of cardiovascular disease, would undoubtedly render a similar recommendation for that population. [Brief *Amici Curiae* in Support of Petitioners by American Public Health Association ("APHA Br.") at A-15].

Thus, CDC did not address, must less sanction, *discriminatory* exclusion of women from lead-exposed positions.[23]

c. Johnson Controls also argues for its vast expansion of the bfoq defense on the ground that employers are subject to a "legal duty to avoid injuries to the unborn that result directly from the toxic hazards of [their] own manufacturing operations." Resp. Br. at 27. This is true, but irrelevant.

An employer has a legal duty reasonably to protect from toxic or other hazards the qualified adult women and minorities the employer hires in compliance with Title VII. There is no privilege to avoid Title VII's (including the PDA's) equal employment requirements on the ground that the employer would rather exclude such individuals entirely than fulfill the duty to protect them from harm once hired.

Equally to the point, the fact that an employer has *a* legal duty to later-born children of employees says nothing about what that duty is. *None* of respondent's long list of citations is a case in which an employee's child has recovered against a non-negligent employer for

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[23] As to the EEOC, that agency's position on the scope of the bfoq as applied to fetal protection issues has varied broadly over the years, and there are currently two different, simultaneously operative, and directly contradictory EEOC documents on the question. *See* Pet. Br. at 27 n.26. Under these circumstances, the agency's views are hardly entitled to deference. Further, since the EEOC's position in *this* case is that Johnson Controls has *not* met the bfoq requirements, deference to the EEOC here would dictate reversal. *See* U.S. Br., *supra*.

prenatal or preconception injuries. Nor are the very narrow instances in which there can be strict liability despite reasonable warnings in any way analogous to those here. *See Prosser and Keeton on the Law of Torts* (5th ed. 1984) at 550-51.[24]

In the end, the tort question just discussed comes down to the policy issue whether employers *should* be free to exclude fertile women generally from employment because those women *may* conceive a child, and there *may* be some risk to such a possible child. That is basically the Title VII question before this Court, and one the Court is obliged to answer under the *express* terms of the federal equal employment opportunity law, not by speculating as to what common law courts might have done were Title VII not on the statute books.

CONCLUSION

For the reasons stated above and in our opening Brief, the judgment below should be reversed.

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[24] Respondent's contention that an adequate warning would not fulfill the employer's duty to an employee's potential fetus because "[i]n the products liability context, a warning is sufficient only if the product is otherwise 'safe for use if [the warning] is followed'" (Resp. Br. at 28 n.28), is another instance of selective, and gravely misleading, quotation of sources. The *very next comment* in the Restatement (Second) Torts to the one respondent cites is headed "[u]navoidably unsafe products" and states that "there are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. . . . Such a product, property prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous." *Id.* § 402A Comment j.

So that we are not misunderstood, we note that the question of what legal duty an employer owes to an employee's fetus has nothing to do with whether the mother can waive her child's cause of action if the child has one, or whether the mother's contributory negligence should be imputed to the child. Rather, it is our understanding that if the employer fully meets his duty (by reducing exposure to the degree reasonable and providing adequate warning to a person with responsibility for the child's health) then there is *no* cause of action to waive, and no negligence to contribute toward.

Respectfully submitted,

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